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No. 07-1109

FILED

MAR 2 8 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN SUPPORT OF PETITIONER FOR *AMICI CURIAE* JENA BAND OF CHOCTAW INDIANS, ALABAMA-COUSHATTA TRIBE OF TEXAS, CITIZEN POTAWATOMI NATION, COQUILLE INDIAN TRIBE, RINCON BAND OF LUISENO INDIANS, SHOALWATER BAY INDIAN TRIBE, SPOKANE TRIBE OF INDIANS, STANDING ROCK SIOUX TRIBE

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Tribal *Amici*, Jena Band of Choctaw Indians, Alabama-Coushatta Tribe of Texas, Citizen Potawatomi Nation, Coquille Indian Tribe, Rincon Band of Luiseno Indians, Shoalwater Bar Indian Tribe, Spokane Tribe of Indians, and Standing Rock Sioux Tribe respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari.

Under the Indian Gaming Regulatory Act ("IGRA")[1] as written, Congress gave the states only a limited role in the conduct of Indian gaming. Congress did not give the State of Texas, or any other state, a veto over tribal IGRA gaming activities, and it ensured that the tribal-state compact requirement would not become a state veto by providing a last-resort remedy for tribes in uncooperative states – the availability of tribal gaming under procedures prescribed by the Secretary of the Interior ("Secretarial procedures").

The Fifth Circuit's decision in this case strips tribes of the Secretarial procedures remedy. Every federally recognized tribe in the United States that is engaged in gaming or would like to be has a stake in the availability of a viable last-resort remedy to conduct gaming on its lands under IGRA. Any tribe

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[1] 25 U.S.C. § 2701 *et seq.*

that needs, now or in the future, to enter into, amend, or renew a tribal-state gaming compact under IGRA depends on the existence of a viable remedy against recalcitrant states. That last-resort remedy provides both a source of equalizing bargaining authority for tribes and an essential safeguard for those tribes whose lands are located in states that refuse to participate in IGRA negotiations. If the Fifth Circuit's decision in this case stands, and the remedy is unavailable, every tribe engaged in compact negotiations or renegotiations will be harmed. Some may still be able to obtain compacts, but the balance of power contemplated by Congress will have been disturbed and their bargaining power will have been substantially reduced. Other tribes will be unable to obtain compacts and will therefore be confronted with the Hobson's choice of operating in an uncertain and hostile environment or being deprived of the valuable opportunity to attain the economic self-sufficiency that tribal gaming represents and that Congress intended tribes to have when it enacted IGRA.

The Tribal *Amici* represent a broad spectrum of tribes from across the nation. Some of the Tribal *Amici* have obtained compacts after long struggles that demonstrate the essential role of the Secretarial procedures remedy in the statutory scheme envisioned by Congress, while others have been entirely unable to reach agreement with the states, and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by the Fifth Circuit's decision. Still other *amici* are tribes with existing

compacts concerned about the impact of the Fifth Circuit's decision on their ability to negotiate amendments and renewals of those compacts.

Each of the Tribal *Amici* has a substantial interest in the outcome of this petition as it affects their access to the gaming activities contemplated by IGRA. The *Amici* are uniquely situated to provide this Court with information about the importance of the Secretarial procedures remedy at issue in this case in a wide variety of factual circumstances affecting tribes around the country. The proposed *amicus* brief focuses on the particular experiences of the Tribal *Amici* in attempting to negotiate compacts and the importance of the Secretarial procedures remedy to their continued ability to do so. The dynamics of these negotiations illustrate the importance of the remedy at issue to the overall Congressional plan set forth in IGRA, a key factor in the severance analysis at issue here. The Tribal *Amici* therefore request leave of this Court to file the attached brief in support of the petition for writ of certiorari to provide this information for the Court's consideration in evaluating that petition.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are federally-recognized tribes from across the nation. The impact of the Fifth Circuit's decision on their individual situations, discussed in more detail in the brief, demonstrates the exceptional importance of the issues presented in the petition for a writ of certiorari in this case. Some of the Tribal *Amici* have obtained tribal-state compacts only after long struggles that demonstrate the essential ro of the Secretarial procedures remedy, while others have been entirely unable to reach agreement with the states and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by this decision. The impact of the Fifth Circuit's decision on their individual situations demonstrates the exceptional importance of the issue raised by the petition for certiorari in this matter and the importance of proper application of this Court's severance jurisprudence to IGRA in order to avoid giving states

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The Kickapoo Traditional Tribe and the State of Texas have consented to the filing of this brief. Their letters consenting to filing have been filed with the Clerk of the Court. The United States and its Department of Interior have not responded. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

a veto over Tribal IGRA gaming activities that Congress never intended.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted because this case raises an issue of paramount importance to every federally recognized tribe in the United States and the Fifth Circuit has addressed that issue in a way that conflicts with both the decisions of its sister circuits and the decisions of this Court.

The Tribal *Amici* set forth herein their own circumstances, which demonstrate the significant impact the Fifth Circuit decision has upon them. The experiences of the Tribal *Amici* include litigation in which another Circuit has reached the issue of IGRA's remedial provisions in the wake of the Supreme Court's decision in *Seminole* in a manner that conflicts with the Fifth Circuit decision. The experiences of the Tribal *Amici* demonstrate the necessity for tribes to have viable remedies when confronted by recalcitrant states, and demonstrate the effect upon negotiating compacts under IGRA when the well has been poisoned by the uncertainty of a viable remedy when states refuse to negotiate compacts in good faith. The Tribal *Amici* all therefore support the petition for certiorari submitted by the Kickapoo Traditional Tribe of Texas.

Under the Indian Gaming Regulatory Act ("IGRA") as written, Congress gave the states only a limited role in the conduct of Indian gaming. Congress did not give the State of Texas, or any other state, a veto over tribal gaming activities, and it made its intent clear that the tribal-state compact requirement should not become a veto by providing a last-resort remedy for tribes in uncooperative states – the availability of tribal gaming under procedures prescribed by the Secretary of the Interior ("Secretarial procedures").

The Fifth Circuit's decision in this case strips tribes of the Secretarial procedures remedy. As a result, tribes that have not been able to obtain tribal-state gaming compacts are without the last-resort remedy of Secretarial procedures Congress intended to provide, and those tribes may never be able to attain the economic self-sufficiency IGRA sought to provide to them. Tribes that have compacts are also negatively impacted. By depriving tribes of the remedy that was intended to establish a balance between tribes and states at the negotiating table, the Fifth Circuit's ruling has tipped the balance wholly in favor of the states, to the detriment of any tribe engaged in compact negotiations and directly contrary to Congress' intent when enacting IGRA.

By doing so, the Fifth Circuit brought its interpretation of IGRA into conflict with the decisions of the Ninth and Eleventh Circuits, which have held that a viable remedy must be available to Tribes because Congress did not intend for states to have a

veto of a tribe's IGRA gaming activities.[2] By invalidating the Secretarial procedures remedy but not conducting severance analysis regarding available remedies, if any, the Fifth Circuit also contravened this Court's precedent providing that severance of invalid statutory provisions is permitted only where Congress would still have enacted the statute with only the remaining provisions.[3] The three-judge panel of the Appeals Court, with three separate opinions, provides two opinions that the Secretarial procedures are invalid, and two opinions that tribes confronted with recalcitrant states must have a viable remedy. Because Congress would not have enacted the Class III compact requirement without providing a safeguard for tribes, the panel's invalidation of the Secretarial procedures while failing to conduct severance analysis regarding available remedies, if any, conflicted with this Court's prior relevant decisions.

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[2] *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

[3] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

ARGUMENT

I. The Fifth Circuit's Decision Invalidating the Secretarial Procedures Conflicts with Two Other Circuits and Creates an Issue of Paramount National Importance.

Under IGRA as passed by Congress, the only tribes with eligible lands that would ever be completely unable to engage in Class III gaming were those tribes located in the few states that do not permit any Class III gaming anywhere in the state by any entity.[4] Any other tribe is entitled to game under IGRA, subject to the ability of the state in which it was located to participate in developing gaming procedures through *good faith* compact negotiations.[5]

Congress intended for the good-faith limitation on states' role in negotiating the terms of tribal gaming to be enforceable in federal court.[6] Recognizing that some states might still refuse to consent, Congress provided tribes with a safety net – the ability to obtain gaming regulations directly from the Secretary of the Interior, who has the express statutory authority to prescribe "procedures" to govern

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[4] 25 U.S.C. § 2710(d)(1)(B).

[5] 25 U.S.C. § 2710(d)(3).

[6] 25 U.S.C. § 2710(d)(7); *see also Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) ("The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.").

tribal gaming in the absence of a compact.[7] The invalidation of the Secretarial procedures remedy limits the authority of the Department of the Interior ("DOI") over tribal affairs in contravention of Congress' intent as well as the Secretary's general authority.[8]

When this Court struck down Congress' attempt to waive States' sovereign immunity to suits enforcing the good-faith negotiation requirement, the Secretary of the Interior – following the directive by the Eleventh Circuit in that same case[9] – used his general rulemaking authority and IGRA's delegated authority to fill the unintended gap, thereby providing tribes in states that will not waive sovereign immunity or otherwise consent to suit under IGRA with a path to the last-resort remedy provided by Congress.[10] By invalidating those regulations, the Fifth Circuit has now destroyed the delicate balance between tribes and states intended by Congress and brought the Fifth Circuit into conflict with two other Circuits that have found that a viable remedy was an

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[7] 25 U.S.C. § 2710(d)(7)(B)(vii).

[8] *See* 25 U.S.C. §§ 2, 9.

[9] *See Seminole Tribe*, 11 F.3d at 1029; *see also Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996) (granting *certiorari* on other issues).

[10] *See Seminole Tribe*, 517 U.S. at 47; 25 C.F.R. § 291 *et seq.* (1999).

indispensable component of the regulatory structure established by IGRA.[11]

The Ninth Circuit invalidated enforcement action by the United States against a Tribe for non-compacted Class III gaming where the State refused to consent to the negotiation/mediation process intended by Congress.[12] The Ninth Circuit reasoned that the United States must interpret IGRA, now broken by reasons set forth in this Court's *Seminole* decision, in a manner that manifests Congress' intent in passing IGRA. The Ninth Circuit identified several possible viable remedies. The Eleventh Circuit expressly stated that procedures promulgated by the Department of the Interior should govern the Tribe's gaming activities.[13] The Secretarial Procedures at issue here are the product of the Department of the Interior doing what the Ninth and Eleventh Circuits told it to do.

If the Fifth Circuit's decision is not addressed and corrected by this Court, a quagmire will exist where states that permit Class III gaming by tribal or non-tribal entities, will maintain that they may refuse to negotiate in good faith with other tribes that wish to game, with no further avenue or recourse for the tribes under IGRA. Tribes unable to reach a compact agreement with recalcitrant states will face

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[11] *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *see also* 25 U.S.C. §§ 2, 9 (Secretary's general authority).

[12] *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

[13] *Seminole Tribe*, 11 F.3d at 1029.

the Hobson's choice between capitulating to unreasonable terms and conditions in a compact, not gaming despite the fact that gaming by others is permitted in the state, or gaming in the face of threats of enforcement action and protracted litigation. None of these choices is consistent with Congress' intent in passing IGRA.

Tribes with Indian lands inside and outside of the Fifth Circuit are severely impacted by the decision. The delicate balance of tribal, federal, and state interests that Congress intended is removed from the negotiating table if the certainty of an adequate remedy is unavailable to tribes. As demonstrated by the experiences of certain of the Tribal *Amici*, discussed below, states use the uncertainty of a viable remedy as false leverage which manifests itself in overreaching regarding the terms and conditions of a tribal/state compact.

The situations of the Tribal *Amici* demonstrate the predominant importance of this issue for tribes around the country and the need for the petition for writ of certiorari to be granted.

II. Without a Viable Remedy, Tribes Will Be Denied Economic Self-Sufficiency Through Gaming Under IGRA, Contrary to Congress' Purpose.

Congress, through IGRA, provided "a statutory basis for the regulation of gaming by Indian tribes as a means of promoting tribal economic development,

self-sufficiency, and strong tribal governments."[14] The tribes most directly and immediately affected by the Fifth Circuit's decision are those that have not yet been able to obtain tribal-state gaming compacts and, thereby, the benefit of economic self-sufficiency through gaming under IGRA that Congress intended to provide.

Amicus Jena Band of Choctaw Indians provides a stark example. The Jena Band is located in Louisiana, which permits Class III gaming by three other tribes and by non-tribal, private entities, but refuses to negotiate a compact with the Jena Band because the Governor believes additional gaming within the state is undesirable.[15] The Jena Band brought suit under IGRA to force good-faith negotiations, but Louisiana asserted its Eleventh Amendment immunity and the suit was dismissed.[16] The Jena Band then sought Secretarial procedures under the

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[14] 25 U.S.C. § 2702.

[15] LA. REV. STAT. ANN. tit. 27; 58 Fed. Reg. 36,264 (July 6, 1993) (approving compact with Chitimacha Tribe of Louisiana); 65 Fed. Reg. 31,189 (May 16, 2000) (approving compact with Louisiana Coushatta Tribe); 57 Fed. Reg. 54,415 (Nov. 18, 1992); Press Release, Governor Kathleen Babineaux Blanco, *Governor Blanco Responds to Jena Band of Choctaw Indians' Efforts to Establish Gaming in Louisiana* (Apr. 12, 2005) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this document with the Clerk of the Court upon request).

[16] *Jena Band of Choctaw Indians v. Blanco*, No. 3:05-cv-00852-JJB-DLD (M.D. La. Mar. 8, 2006) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

regulatory process invalidated by the Fifth Circuit decision in this case, and it was close to completing the process to obtain Secretarial procedures permitting it to game when the Fifth Circuit's decision was issued; that process is now subject to an indefinite hold. Without either reversal of the Fifth Circuit's decision or a change of heart by the State of Louisiana, the Jena Band is not generating gaming revenues, while their sister Louisiana tribes and non-tribal entities are able to raise needed funds through gaming activities. The Jena Choctaw must now either forego gaming or face the quagmire confronted by other Tribal *Amici*, discussed below.

III. Allowing the Fifth Circuit Decision to Stand Creates an Unintended Quagmire in Which Tribes Confronted by Recalcitrant States Must Either Forego Gaming or Take Unnecessary Risks – An Untenable Situation that Congress Intended to Avoid by Passing IGRA.

Failure to grant certiorari in this litigation will leave unresolved the critical question of what remedy, if any, is available to Tribes when confronted by recalcitrant states, as it has been since this Court's decision in *Seminole Tribe*. Three tribes with Indian lands in Washington State have experienced the quagmire that exists in such an uncertain environment.

The Confederated Tribes of the Colville Reservation filed an IGRA lawsuit against Washington State

in 1992. Washington State asserted defenses alleging IGRA violated the Tenth and Eleventh Amendments. The District Court agreed with the State, but then engaged in severance analysis and struck down all of IGRA's compacting provisions rather than leave the Tribe without a viable remedy.[17] Despite that decision, and despite the Ninth Circuit decision involving the Spokane Tribe, *supra,* the United States brought enforcement action against the Tribes' Class III gaming operation.[18] After initially ruling against the Tribes and being reversed and remanded by the Ninth Circuit the District Court stayed further proceedings while the Colville Tribes initiated the process for Secretarial Procedures.[19] The State of Washington ultimately agreed to a compact with the Colville Tribes, but only after the Tribes capitulated

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[17] *Confederated Tribes of the Colville Reservation v. Washington*, No. CS-92-0426, slip. op. at 4-5 (E.D. Wash. June 4, 1993) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

[18] *United States v. 794 Electronic Gambling Machines*, No. CS 98-264-FVS (E.D. Wash.) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this action with the Clerk of the Court upon request).

[19] *United States v. 794 Electronic Gambling Machines*, No. CS 98-264-FVS (E.D. Wash. Dec. 10, 1998) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this order with the Clerk of the Court upon request); *United States v. 794 Electronic Gambling Machines*, Nos. 99-35153, 99-35154 (9th Cir. 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this memorandum decision with the Clerk of the Court upon request).

to the State's demand that the Tribes withdraw its application for Secretarial Procedures.

Amicus Spokane Tribe, whose case gave rise to the Ninth Circuit opinion with which the Fifth Circuit's decision conflicts, spent eighteen years trying to obtain a compact.[20] Like the Colville Tribes, the Spokane Tribe filed a lawsuit against Washington State under IGRA, which was ultimately dismissed after the Supreme Court's decision in *Seminole*. The Tribe proceeded with Class III gaming activities in the absence of a tribal/state compact, and the United States responded by obtaining an injunction against the Tribe from the District Court under IGRA. The Ninth Circuit struck down the injunction, reasoning that the State of Washington could not deprive the Tribe of its gaming rights by refusing to consent to IGRA's negotiation/mediation process.[21] Even after that decision, the United States continued enforcement actions against the Spokane Tribe, alleging that a seizure action by the United States Attorney or a closure order by the National Indian Gaming Commission were still available to the United States. After initially ruling against the Tribe on the seizure theory and being reversed and remanded by the Ninth Circuit, the District Court stayed further

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[20] *United States v. Spokane Tribe*, 139 F.3d 1297, 1299 (9th Cir. 1998).

[21] *Id.*

proceedings while the Spokane Tribe sought a negotiated compact with the State.[22]

Amicus Shoalwater Bay Indian Tribe was shuttered by the United States for offering machine gaming that the District Court determined was not within the scope of "permitted" gaming under IGRA.[23] The Tribe re-opened with machines that were within the scope of "permitted" gaming, only to have the National Indian Gaming Commission ("NIGC") issue a Closure Order. In the Tribe's appeal to an Administrative Law Judge, the enforcement action by the NIGC was stayed until either the Tribe and State reached agreement on a compact, or the Secretary could demonstrate that the Secretarial Procedures were a real and viable remedy.[24] While the enforcement action was stayed, the Tribe and State reached agreement on the terms of a compact.

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[22] *United States v. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d 1219 (E.D. Wash. 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this order with the Clerk of the Court upon request); *United States v. Spokane Tribe of Indians*, No. 99-35155 (9th Cir. Dec. 27, 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this memorandum decision with the Clerk of the Court upon request).

[23] *Shoalwater Bay Tribe v. United States*, No. C 98-668 R (W.D. Wash. 1998) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this unpublished decision with the Clerk of the Court upon request).

[24] *In the Matter of Shoalwater Bay*, No. NIGC 99-2 (United States Dept. of the Interior Office of Hearings and Appeals, 1999) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of this document with the Clerk of the Court upon request).

All three of these tribes initially sought compacts shortly after the passage of IGRA in 1988. As a result of this Court's decision in *Seminole Tribe*, all three were denied the ability to bring the recalcitrant State of Washington to the negotiating table and had to seek other remedies. All three operated Class III gaming under constant threats of improper enforcement action and financial uncertainty. For more than fifteen years, they were faced with the Hobson's choice of either not engaging in Class III gaming or engaging in such activity under the constant threat of enforcement action. They reached compacts only after protracted litigation in which the State of Washington was confronted with the reality that IGRA was not intended to function as a State veto over tribal Class III gaming. If the Secretarial procedures had been implemented (as opposed to simply being on the books), it would have avoided this drawn-out and costly legal battling and would have ensured – at a much earlier point in the process – that tribal Class III gaming was conducted by these tribes for the purposes and under the regulatory framework intended by IGRA.

The Fifth Circuit's decision returns tribes around the country, once again, to circumstances Congress did not intend, in contravention of this Court's severance jurisprudence. Even with a severance clause, unconstitutional provisions of a statute cannot be severed and other provisions left intact if

the resulting statute would be inconsistent with Congress' intent.[25] The Secretarial procedures remedy is an essential safeguard for tribes that preserves their bargaining power and their ability to use gaming under IGRA as an economic development tool.[26] By refusing to recognize the validity of Secretarial procedures, the Fifth Circuit's decision results in a version of IGRA that Congress would never have passed. The Circuit decision therefore conflicts with this Court's established precedent regarding statutory severance, and this too justifies granting the petition for a writ of certiorari.

IV. Even Tribes with Existing Compacts Need the Secretarial Procedures to Ensure a Level Playing Field During Future Negotiations to Renew or Amend Compacts.

Compacts do not last forever. Every state except Washington, Kansas, and Minnesota has expiration dates in its compacts, and even those without pending expiration dates require occasional amendments to adjust to changing circumstances. Without the availability of a Secretarial procedures remedy, or other viable remedy, tribes have no real bargaining power in their negotiations to renew or amend

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[25] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

[26] *See Spokane Tribe*, 139 F.3d at 1299; *see also* S. Rep. No. 100-446, at 13 (1988) ("It is the Committee's intent that the compact requirement for Class III not be used as a justification by a state for excluding Indian tribes from such gaming.").

compacts. The Fifth Circuit's decision in this case tells states that, if they wish to oppose tribal gaming in whole or in part, they can simply refuse to negotiate, even if they lack a good faith basis for doing so. What remaining bargaining authority can tribes have without either the judicial protection of good-faith litigation contemplated by IGRA (struck by this Court in *Seminole*) or the last-resort Secretarial procedures prescribed by Congress (struck by the Fifth Circuit)? The Fifth Circuit's decision, if permitted to stand, permanently poisons the well for tribes that want to offer gaming.

DOI's track record prior to Texas bringing suit was far from exemplary. Indeed, DOI's failure to take action in a timely fashion on those tribes that applied for the Secretarial Procedures remedy was critical to the Administrative Law Judge's decision regarding the Shoalwater Bay Tribe, discussed above. The existence of dozens of compacts from tribes in a number of states since the issuance of the Supreme Court decision in *Seminole* does not demonstrate that IGRA works despite the tribes' lack of a viable remedy. Rather, the states' assertions that the Secretarial Procedures are invalid coupled with the United States' inactivity on pending applications continued to poison the well at all IGRA negotiation tables. These compacts contain terms and conditions that are the product of a poisoned well, and many of the

provisions contained therein may be the product of State overreaching.[27]

Tribes such as the *Amicus* Coquille Tribe, whose compact with Oregon may be affected by pending legal challenges to the validity of Oregon's tribal-State compacts,[28] are impacted by the Fifth Circuit's decision. If the Oregon compacts are struck down by the courts and the Tribes must return to the negotiating table to reach new ones, *Amicus* Coquille may be without recourse if the State takes advantage of the imbalance of power created by the Fifth Circuit's decision.

Tribes like *Amici* Citizen Potawatomi Nation, Rincon Band of Luiseno Mission Indians, and Standing Rock Sioux Tribe, who presently have tribal-state compacts, anticipate the Fifth Circuit decision will impact their ability to negotiate necessary compact

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[27] *See, e.g.*, *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 931-33 (7th Cir. 2008) (questioning the validity of revenue sharing provisions in tribal/state compacts).

[28] The validity of Oregon's compact with the Confederated Tribe of Coos, Umpqua, and Siuslaw Indians is currently being challenged in state court. *State ex rel. Dewberry v. Kulongoski*, No. A124001 (Or. App.) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this case with the Clerk of the Court upon request). That challenge also has the potential to affect the Coquille Tribe's compact. Other tribes have faced similar challenges. *See, e.g.*, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Warren v. United States*, No. 06-CV-00226 (W.D.N.Y., filed Aug. 16, 2006) (consistent with Supreme Court Rule 32.3, *amici* will lodge a copy of the complaint in this case with the Clerk of the Court upon request).

amendments and renewals. Each of these tribes has been a party to contentious compact negotiations, has faced choices of making concessions at the negotiation table rather than initiating uncertain and protracted litigation regarding the availability of a remedy to hold states accountable at the negotiating table for the good faith conduct Congress required. These tribes have seen firsthand the effect that the existence of IGRA's remedies has in keeping states at the negotiating table and allowing the tribes and the states to reach agreement on compact terms. All of these tribes have a stake in the continued availability of fair negotiations with states, negotiations that are ensured by the existence of a last-resort remedy in IGRA for tribes that face uncooperative states.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to grant the petition for writ of certiorari and to reverse the decision of the Fifth Circuit, restoring the Secretarial procedures remedy or to apply the necessary severance analysis interpreting IGRA in the wake of the *Seminole* decision in a manner that

provides tribes a viable remedy against recalcitrant states, as intended by Congress.

Respectfully submitted,

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